

The ALJ found claimant suffered a work-related 8.25 binaural hearing loss during his tenure with the Topeka Fire Department, which began in 1963 and ended in 1998. Respondent does not dispute the hearing loss but argues claimant suffered no worsening and, therefore, no accidental injury after 1992 or 1993. As such, respondent contends the claim is time barred because claimant failed to give respondent timely notice of accident, timely written claim and failed to file a timely application for hearing for a 1992 or 1993 accident.

The issue for the Board's review is whether claimant suffered personal injury by accident arising out of and in the course of his employment with the respondent on the dates alleged and, if so, the nature and extent of claimant's disability.

Claimant asked that Judge Avery's Award be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Board finds as follows:

Respondent's Application for Review by the Workers Compensation Appeals Board lists:

Issues Presented for Review by Respondent: All findings and decisions contained in said Award, including but not limited to: A. Whether the claimant met his burden of proof on issues of personal injury by accident on the dates alleged, arising out of and in the course of employment, and nature and extent of disability.¹

In its brief to the Board, however, respondent argues that: "[C]laimant's claim for workers compensation benefits is barred, because he failed to timely give respondent notice of accident, serve respondent with a timely written claim for benefits, and failed to file a timely application for hearing for a 1992 or 1993 accident."² The timeliness of claimant's notice, written claim and application for hearing were not made issues before the ALJ. At the April 11, 2002 regular hearing, Administrative Law Judge Brad E. Avery described the stipulations as follows:

Judge Avery: Okay. Counsel, you had a prehearing settlement conference hearing in this matter in June of this [sic] year 2001. This is a Shawnee County accident alleged series through 12/25/98. The respondent denies the claimant met with personal [injury by] accident on the date or dates alleged. Respondent denies the alleged accidental injury arose out of and incurred [sic] in the course of employment. Respondent admits timely notice in [sic] relationship of employer and employee [, the parties are] covered by the act and timely written claim [was made]. There has been stipulation as to average weekly wage or actually to the average weekly wage would equal

¹ Application for Review by the Workers Compensation Appeals Board (filed March 31, 2003).

² Brief of Respondent In Support of Its Application for Review (filed May 9, 2003).

the maximum comp rate of 366. No temporary total compensation has been paid.³

Judge Avery then recited the issues as follows:

Judge Avery: No hospital or medical treatment was furnished. There is a claim for reimbursement for hearing aids on the part of the claimants [sic] leaving the issues to be decided by the court whether claimant suffered personal injury by accident on date alleged, whether the accidental injury arose out of and occurred in the course of employment, whether the claimant is entitled to reimbursement for the hearing aids, future and unauthorized medical and nature of extent of disability. Okay. Any additions modifications or corrections to that record before we get started?

Mr. Patty: None.

Mr. Cooper: No, Your Honor.⁴

Claimant's January 21, 2003 submission letter to Judge Avery listed the issues as:

1. Whether the alleged accidental injury arose out of and in the course of employment?
2. Is [c]laimant entitled to medical reimbursement?
3. Is claimant entitled to [f]uture medical expenses?⁵

Respondent's February 25, 2003 Submission letter to Judge Avery listed the issues as:

1. Whether the claimant met with personal injury by accident in a series alleged through December 25, 1998.
2. Whether the accidental injury arose out of and in the course of employment.
3. Nature and extent of disability.

³ R. H. Trans. at 4-5; See K.A.R. 51-3-8.

⁴ R.H. Trans. at 5-6.

⁵ Submission Letter and Brief Filed on Behalf of Claimant, Robert R. Christian in Robert R. Christian v. City of Topeka, Dk. 259,447 at 2 (filed Jan. 21, 2003). Claimant also did a second submission letter on February 17, 2003 listing the same issues.

4. Whether claimant is entitled to medical reimbursement.⁶

The list of stipulations in Judge Avery's March 17, 2003 Award included the following:

- 1) Claimant provided timely notice of the accident to the respondent.
- 3) Claimant submitted timely written claim to the respondent.⁷

The Award listed the issues as:

1. Whether claimant suffered personal injury by accident.
2. Whether the alleged accidental injury arose out of and occurred in the course of employment with the respondent.
3. Nature and extent of disability.
4. Reimbursement for hearing aid.
5. Future and unauthorized medical care.⁸

The Board has repeatedly held that issues may not be raised for the first time on appeal. Not only were notice, written claim and application for hearing not raised as issues at the regular hearing, but respondent stipulated that claimant's notice and written claim were timely made to respondent. No request was made by respondent to the ALJ to withdraw those stipulations. Moreover, these are defenses that must be raised at the trial level before the ALJ.⁹ Accordingly, the Board finds that the only issues preserved for the Board's review are those listed in the ALJ's Award.¹⁰

After 1993, following his promotion to a supervisory position, claimant's exposure to noise was less. Nevertheless, he continued to be exposed to significant occupational noise. Although there was only a slight amount of additional hearing loss shown on the

⁶ [Respondent's] Submission Letter at 2 (filed Feb 26, 2003).

⁷ Award (March 17, 2003).

⁸ *Id.* at 2.

⁹ *Cf. Coffman v. State of Kansas*, 31 Kan. App. 2d 61, 59 P.3d 1050 (2002); *In re Tax Appeal of Trickett*, 27 Kan. App. 2d 651, 8 P.3d 18 (2000).

¹⁰ See K.S.A. 44-555c(a).

audiogram performed in 1998 as compared to the 1992 audiogram, the tests demonstrated that there was a worsening. Dr. Bieri did not consider the difference to be significant, but Drs. Thedinger and Ator opined claimant's condition continued to worsen throughout his period of employment. This is supported by claimant's testimony and by the fact that he did not ascertain a need to obtain hearing aides until 1998. Furthermore, to the extent Dr. Thedinger gave an opinion on cross-examination to the effect that claimant did not suffer a work-related hearing loss after 1993, it was premised upon his being asked to assume that claimant was constantly wearing hearing protection. That assumption was incorrect and, therefore, the hypothetical question posed was foundationally deficient. Claimant did wear hearing protection at times after 1989, and in particular during 1992. But claimant did not regularly use hearing protection while performing his job as district chief in 1993 and thereafter. As a district chief claimant did not ride in the large trucks, but he still went to fire scenes and was still exposed to loud noises in the course of his employment, including sirens, air horns, power tools, diesel engines and alarms. Accordingly, the Board finds that claimant did suffer some additional work-related hearing loss throughout his period of employment after 1992.

This is a claim for a series of accidents resulting in repetitive trauma injuries. The ALJ was correct in applying *Treaster*¹¹ to find the accident date was December 25, 1998, claimant's last day of work for respondent. The Board also agrees with Judge Avery's other findings and conclusions and adopts them as its own.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 17, 2003 is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹¹ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.3d 325 (1999).

c: Clinton E. Patty, Attorney for Claimant
Jeff K. Cooper, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director